IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible] 170 171

CHESAPEAKE & OHIO RAILWAY COMPANY,
Petitioner,
versus
WESTINGHOUSE, CHURCH, KERR & COMPANY, INC., Respondent,

and

WALKER D. HINES, LATE DIRECTOR GENERAL OF RAILROADS, Petitioner,
versus
WESTINGHOUSE, CHURCH, KERR & COMPANY, INC., Respondent.

Brief for Respondent in Opposition to Motion and Petition for Writ of Certiorari.

[illegible]
Attorneys for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

Nos. 642 and 643.

CHESAPEAKE & OHIO RAILWAY COMPANY,
PETITIONER,
versus
WESTINGHOUSE, CHURCH, KERR & COMPANY, INC., RESPONDENT,

and

WALKER D. HINES, LATE DIRECTOR GENERAL OF RAILROADS, PETITIONER,
versus
WESTINGHOUSE, CHURCH, KERR & COMPANY, INC., RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO MOTION AND PETITION FOR WRITS OF CERTIORARI.

STATEMENT OF CASE.

While counsel for the petitioners in their brief in support of the petitions quoted at length the statement of facts as set forth in the opinion of the Supreme Court

of Appeals of Virginia, the essential facts of the cases for the purposes of this brief may be stated as follows:

The respondent in 1917 and 1918 was engaged in the construction at Newport News, Virginia, of certain embarkation facilities for the United States Government. Its construction material arrived at Newport News on the railroad of the petitioners. Side-tracks for the delivery of cars consigned to the respondent were constructed partly by the petitioners and partly by the respondent into the different camps at which the respondent was carrying on the Government's construction program. A few of the cars consigned to the respondent moved in intrastate commerce, but the vast majority of them moved in interstate commerce. During the period in question it is estimated that about 6,500 cars arrived at Newport News for the respondent, and in addition thereto a large number of other shipments were arriving daily for the Government, and for other activities at Newport News, arising out of and incident to the prosecution of the World War.

The yard of the petitioners at Newport News became congested, and their organization demoralized, with the result that great delay was experienced by the respondents, due to failure of the petitioners to make delivery of the cars on the sidings constructed and designated for the purpose. Cars consigned to the respondent were scattered throughout the yard, stored on the numerous sidings and spur tracks where they remained buried for periods varying from one to six or eight weeks.

Numerous conferences were held from time to time by the representatives of the respective parties, until the superintendent of terminals of the petitioners at Newport News stated to the superintendent of the respondent that the "only possibility of their (petitioners) being able to make these deliveries of material to us in time to avoid delays in the construction work would

be by assigning to us a locomotive. In the meantime, we had had about 1,000 cars received up to that time and a large part of the cars were buried in the storage tracks in the C. & O. Yards. * * * "

At the suggestion of the superintendent of terminals of the petitioners, the respondent on September 28, 1917, addressed the following letter to the C. & O. Railroad Company:

"Newport News, Virginia, Sept. 28, 1917.

"Chesapeake & Ohio Railroad Co.,
Newport News, Va.

Attention Mr. Ford, Supt. of Terminal.
1892-6

Gentlemen:

Referring to our conversation with you to-day, we believe the switching problem is getting so heavy on account of the work at the various sites that it would be advisable for you to assign us an engine and crew on your usual basis, billing us for the cost of operation as you may elect.

We would appreciate it if you would arrange for this engine and crew at the earliest possible moment, and also advise us if there is anything we can do towards helping out in furnishing a crew for this engine.

Yours very truly,

WESTINGHOUSE, CHURCH,
KERR & COMPANY,

AWB/JJC

ALFRED W. BOWIE,
Engineer in Charge.

(Record, p. 101, Case 642.)

On September 29, 1917, the Railroad Company replied as follows:

"Newport News, Va., September 29, 1917.
File 133.

Westinghouse, Church, Kerr & Company,
Newport News, Va.

Gentlemen:

Your letter of the 28th inst., under file 1892-6 with respect to providing an engine and crew to take care of your business at the various camp sites.

Beg to state that this engine will be assigned to your work, commencing Monday night and you will be billed for the use of the engine and crew together with the cost of supplies, repairs, etc., plus ten per cent.

Yours very truly,

Superintendent

(Record, p. 102, Case 642.)

The tariffs under which both the intrastate and interstate cars moved provided, and in fact the petitioners conceded, that the respondent was entitled to one placement of each car on the siding designated for the purpose for the line-haul charge. The engine and crew assigned pursuant to the two letters quoted above were intended to be used, and were used, for the delivery of respondent's cars from the yards of the petitioners to the various sidings. The engine and crew operated in the day time under the immediate direction of a yardmaster employed by the respondent, subject to the general direction of the yardmaster of the petitioners, and at night the engine and crew operated under the immediate direction of the petitioners' yardmaster.

These actions were instituted by the petitioners to recover compensation for the use of the engine in addition to the line-haul charge provided by the tariffs lawfully on file. The amount sought to be recovered was based upon a rental circular of the petitioners. There

was no tariff authority, either intrastate or interstate, for the charge.

The respondent defended the actions on two grounds, namely:

(1) That the service performed by the engine was a service which the petitioner should have rendered under the aggregate line-haul charge paid on the freight, and that the contract was without lawful consideration and was, therefore, void; and,

(2) That the engine was a "transportation" facility and was used in a "transportation" service within the meaning of the Interstate Commerce Act and was violative of the Interstate Commerce Act and the laws of the State of Virginia in such case made and provided, and was, therefore, void and unenforceable.

The trial court rendered judgment for the respondent, which judgment, on appeal to the Supreme Court of Appeals of Virginia, was affirmed on the ground that *there was no legal consideration for the promise relied upon.*

The record presents no question reviewable by this Honorable Court, for which reason the petition for Writs of Certiorari should be denied.

By referring to the opinion of the Supreme Court of Appeals of Virginia (Record, pp. 139 to 145, Case 642) it will be observed that the state court did not determine the question whether the alleged contract was violative of the Interstate Commerce Act, and the corresponding provisions of the laws of the State of Virginia, but on the contrary, decided and disposed of the

case on the ground that there was no consideration for the alleged contract. The last paragraph of the opinion is as follows:

> "We do not think it necessary to consider any other feature of the case, for there is nothing in the record which can vary or modify the result. *There was no legal consideration for the promise relied upon,* and the trial Court rightly determined that the Railroad Company had no right of recovery." (Italics supplied.)

The defense that the alleged contract violated the Interstate Commerce Act involved a Federal question. The defense that the contract was without consideration did not involve a Federal question. The state court disposed of the case on the latter ground, and it is settled that if the decision of the state court on the non-federal question disposes of the case without involving the Federal question, then no right of review exists in this Honorable Court.

See:

Arkansas Southern R. R. Co. vs. *German National Bank,* 207 U. S. 270, 275.

Berea College vs. *Kentucky,* 211 U. S. 45, 53.

As observed above, it was conceded by the petitioners that the respondent was entitled to one placement of its cars upon the sidings. The state courts simply determined as a fact that the engine for which this additional compensation is claimed was assigned to and used in the performance of that service, and held upon common law principles that the contract was not supported by a legal consideration. For these reasons and upon the authority of the cases cited above, we submit that Writs of *Certiorari* will not lie under Section 237 of the Judicial Code to review the judgment of the Supreme Court of Appeals of Virginia.

The alleged contract is violative of the Interstate Commerce Act, and no Federal question is presented which has not been finally adjudicated by prior decisions of this Honorable Court.

The engine was not rented to the respondent for use by it in intraplant or interplant switching service at its convenience. On the contrary, the engine was assigned for the purpose of ferreting out the respondent's cars in the yard of the petitioners, and in making delivery of those cars upon the sidings constructed and designated for such delivery, and was so used. The engine crew were employees of the petitioners and reported to and were paid by the petitioners. The respondent merely employed an experienced railroad man whom it designated as its yardmaster to work with the engine in an endeavor to get delivery of the cars which the petitioners had utterly failed to deliver. Clearly, we submit, the service performed was a "transportation" service as defined by Section 1 of the Interstate Commerce Act, 24 Stat. L. 379, as amended by 34 Stat. L. 584, 36 Stat. L. 545. Likewise we submit it is clear that the engine was a "transportation" facility within the meaning of Section 6 of the Interstate Commerce Act, 24 Stat. L. 381, as amended by 25 Stat. L. 856, 34 Stat. L. 587.

See:

Cleveland & St. L. Ry. vs. *Dettlebach*, 239 U. S. 588, 593, 594.

Southern Railway Co. vs. *Reid*, 222 U. S. 424, 440.

Southern Railway Co. vs. *Prescott*, 240 U. S. 632, 637, 638.

The facility and service performed being, as we submit, a "transportation" facility and service, the peti-

tioners could not under the provisions of Section 6 of the Interstate Commerce Act,

> "* * * charge or demand, or collect or receive a greater or less or different compensation * * * than the rates, fares and charges which are specified in the tariff filed and in force at the time. * * * "

There was no tariff on file providing for or authorizing the charge which the petitioners sought to collect in these actions.

If, as the petitioners contend, the facility furnished and service rendered was a facility and service in addition to that to which the respondent was entitled for the line-haul rate under the lawful tariffs on file, it was nevertheless a "transportation" facility and service, and therefore, could not lawfully be rendered in the absence of tariff provision therefor, as Section 6 of the Interstate Commerce Act specifically prohibits a carrier to "extend to any shipper or person any privileges or facilities in the transportation of persons or property, except such as are specified in such tariffs." And it is settled by decisions of this Court that a contract to furnish a facility or service not provided for in a duly established tariff is void, and no action can be predicated thereon. Likewise, if, as the petitioners contend, the facility furnished and service rendered was a facility and service in addition to that to which the respondent was entitled for the line haul rate under the tariffs on file, it being nevertheless a "transportation" facility and service, the alleged agreement was, we submit, violative of Section 3 of the Interstate Commerce Act (24 Stat. L. 380), which makes it unlawful to make or give undue or unreasonable preferences and advantages to any shipper.

See:

Texas & Pacific Ry. vs. *Abilene Cotton Oil Co.*, 204 U. S. 426.

Louisville & Nashville R. R. Co. vs. *Motley*, 219 U. S. 467.

Chicago & Alton R. R. vs. *Kirby*, 225 U. S. 155.

Atcheson, &c., Ry. Co. vs. *Robinson*, 233 U. S. 155.

Mitchell Coal Co. vs. *Pennsylvania Railroad Co.*, 230 U. S. 247.

Pennsylvania Railroad Co. vs. *Sonman Coal Co.*, 242 U. S. 120.

Southern Ry. Co. vs. *Reed, supra.*

Southern Ry. Co. vs. *Prescott, supra.*

United States vs. *Texas & Pacific R. R. Co.*, 185 Fed. 820, 823.

We further submit that as under the line-haul rate the respondent was entitled to have its cars delivered upon the sidings constructed and designated for the purpose, this additional charge which the petitioners seek to collect is unjust and unreasonable, and is prohibited by Section 1 of the Interstate Commerce Act (24 Stat. L. 379, as amended by 34 Stat. L. 584, 36 Stat. L. 545), and is likewise violative of Section 2 of the Interstate Commerce Act (24 Stat. L. 379), which forbids a carrier to charge, demand, collect, or receive from any person a greater or less compensation for any service rendered in the transportation of property, subject to the provisions of the Act, than it charges, demands, collects or receives from any other person for a like or contemporaneous service in the transportation of like kind of traffic under substantially similar circumstances and conditions.

Points I, II and III of Petitioners' Brief considered.

The record, we submit, and the facts appearing in the "Statement of the Case," at page 7 of petitioners' brief clearly disclose that the engine and crew were not assigned to furnish "switching and spotting service solely at the shipper's convenience," as contended in Point I, at page 12 of petitioners' brief. As heretofore pointed out, the purpose of assigning the engine was to ferret out from the various sidetracks in the petitioners' yard cars which had arrived for the respondent and which had not been delivered, and to make delivery of such cars on the sidings constructed and designated for such delivery. The engines were used for that purpose, as found by the state court. The principle stated at page 12 of petitioners' brief, we submit, has no application to the facts of this case.

Under "Point II," at page 13 of petitioners' brief, it is contended that the obligation on the petitioners to make delivery of cars under the line-haul rate "does not contemplate the furnishing of special facilities to a shipper to meet abnormal or unprecedented conditions."

The respondent in this case is not seeking to recover an allowance from the petitioners for any service which the respondent may have performed in getting its cars delivered. On the contrary, the petitioners seek to recover a charge for a facility and service rendered in what they seem to concede to be a "transportation" service within the meaning of the Interstate Commerce Act, when there was no tariff on file authorizing such charge. For this reason we also submit the principle contended for in Point II of petitioners' brief has no application to this case.

The same is true of the contention made under Point III at page 17 of petitioners' brief. There it is contended that the failure to exact the compensation sought to be recovered in these actions constituted an undue preference or an illegal expedited service. At page 18 of petitioners' brief it is said:

"Indeed, if the question of a preferential or expedited service is here involved, the failure to exact payment for the engine and crew will constitute a preference since *respondent is thereby given a preference over other shippers during the term of this contract of a service valued by the parties themselves at the sum of $13,298.93.*"

The petitioners in this point seem to concede that the service was a "transportation" service and contend that they will be guilty of giving a preference if they do not collect compensation. The rendition of a transportation service not provided for in the tariffs is in itself a preference, for which reason we submit that the petitioners' contention on this point cannot be sustained. The authorities cited under this division of petitioners' brief deal with agreements for non-carrier service not regulated by the Interstate Commerce Act, and, therefore, we submit, have no application to this case.

CONCLUSION.

In conclusion, we respectfully submit that, for the reasons hereinbefore stated, the judgment of the Supreme Court of Appeals of Virginia is not subject to review by this Honorable Court, that, so far as the defense that the alleged contract was violative of the Interstate Commerce Act is concerned, every question raised has been decided by this Court adversely to petitioners' contentions, and that, therefore, the petition for Writs of *Certiorari* should be refused.

Respectfully submitted,

Henry W. Anderson,
Thomas B. Gay,
Of Counsel for Respondent.

Munford, Hunton, Williams & Anderson,
Wirt P. Marks, Jr.,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 170.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,
vs.
WESTINGHOUSE, CHURCH, KERR & CO., INC.

No. 171.

WALKER D. HINES, LATE DIRECTOR GENERAL OF RAILROADS,
Petitioner,
vs.
WESTINGHOUSE, CHURCH, KERR & CO., INC.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF FOR RESPONDENT.

HENRY W. ANDERSON,
THOMAS B. GAY,
WIRT P. MARKS, JR.,
Counsel for Respondent.

RICHMOND PRESS, INC., PRINTERS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

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No. 171.

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ON WRITS OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF FOR RESPONDENT.

PRELIMINARY STATEMENT.

These cases are before this Court on writs of certiorari awarded on October 27, 1924, (R., p. 132),

to final judgments of the Supreme Court of Appeals of Virginia entered on June 26, 1924, (R., p. 117), affirming judgments of the Circuit Court of the City of Richmond, (R., pp. 130-131).

Identical issues were involved in both cases, and in the trial court a jury trial was waived and all matters of law and fact were submitted to the court for its decision. The trial court heard the cases together on the same record, and they were likewise heard on the same record and disposed of in a single opinion by the Supreme Court of Appeals of Virginia. (R., p. 112; 138 Va. 647.)

Both the trial court and the Supreme Court of Appeals of Virginia denied recoveries and entered final judgments for the respondent.

STATEMENT OF THE CASE.

A clear conception of the facts established in the Record is essential to a proper application of what we conceive to be the controlling law. The "Statement of the Case" appearing in the brief for petitioners, beginning at p. 3, is in our view both inadequate and in several particulars erroneous. We will, therefore, make a statement of the case in chronological order, and as briefly as a proper conception of the issues involved permits.

There was conflict in the testimony for the petitioners and the testimony for the respondent on two important points in the case. It is settled, however, under the law of the State of Virginia, that

the decision of the trial Judge which resolved those issues in favor of the respondent are as final and conclusive as the verdict of a jury would be. (R., p. 113; *F. W. Stock & Sons* v. *Owen*, 129 Va. 261.) This Court will not undertake a consideration and decision of conflicts in the testimony, but will accept the findings of facts by the State Courts as conclusive. See: *Interstate Amusement Co.* v. *Albert*, 239 U. S. 560, 566; *Waters-Pierce Oil Co.* v. *State of Texas*, 212 U. S. 86, 97.

Ignoring the conflicts in the testimony, which have thus been determined in favor of the respondent, the facts are as follows:

Shortly after the United States entered the World War, a military commission was sent to the vicinity of Hampton Roads to select a site for embarkation facilities. The City of Newport News, Virginia, and the Chesapeake & Ohio Railway Company hereinafter sometimes referred to as the "Railway Company," held out certain inducements for the location of the port at Newport News. The Railway Company promised to construct a side tract to the site considered at Newport News. Newport News was selected as the location for the port. (R., p. 70.)

The United States of America awarded the contract for the construction of the embarkation facilities at Newport News to the respondent. The contract was dated August 16, 1917, and provided for compensation to the respondent on a cost plus basis. (R., pp. 97, 100-101.)

The contract was an emergency contract, (R., p. 97), and while it was formally dated August 16, 1917, respondent was given advance notice of the award and proceeded at once in the performance thereof, including the purchase and shipment of material. (R., pp. 44-45.)

Major H. K. Love, Construction Quartermaster, representing the Government, and A. W. Bowie, the engineer of respondent in charge of the construction at Newport News, and the latter's subordinates, arrived at Newport News on July 30, 1917, and immediately began the construction under the award. (R., pp. 43, 70). At that time, material had begun to arrive over the Railway Company, the only railroad serving Newport News. (R., pp. 44-45.)

The line of railroad of the Railway Company entered Newport News from the north and ran through the city southwardly to the water front. The first construction undertaken under the award was Camp Stuart, which was located east of and about three miles from the railroad yards. Subsequently, the construction of Camp Hill, which was located on the west side of and parallel to the railroad, a large number of warehouses along the railroad adjacent to Camp Hill, warehouses at the old stevedore camp east of the railroad and north of Camp Hill, and other facilities for the needs of the Government, was undertaken under said award and contract. (R., p. 19.)

When the Construction Quartermaster and res-

pondent's Engineer arrived in Newport News on July 30, 1917, the Railway Company had not begun construction of the side track to the site selected for Camp Stuart, and the only space which the Railway Company had available for delivery of respondent's material was a spur track in the city of Newport News which had been used as a public delivery track and which had a capacity for the placement of only four cars at a time. (R., pp. 43, 70-71).

The Railway Company was immediately and repeatedly urged by the General in charge of the port, the Construction Quartermaster, and the respondent to construct the siding at the earliest possible date. It finally promised to have the siding ready for operation by September 1, 1917. The Railway Company did construct the siding from its main line to the entrance to Camp Stuart by September 1st. The respondent constructed that part of the siding located within the Camp and the siding was put in use on September 1, 1917. (R., pp. 20, 43, 71). In the meantime, respondent had to hire wagons and trucks to haul its material from the general delivery track to Camp Stuart, a distance of about three miles, all at the expense of the United States Government. (R., p. 71).

When the construction of Camp Hill and the warehouses was subsequently commenced, the necessary side tracks for delivery of material were constructed, partly by the Railway Company and partly by the respondent. The Railway Company

paid the cost of these sidings located on its right of way, and the respondent, and ultimately the Government of the United States, paid for the part of the sidings located on the Government property. (R., p. 21).

Before the siding into Camp Stuart was opened for use on September 1, 1917, large quantities of carload freight for construction purposes had arrived for the respondent, and large shipments of war material, supplies, etc., had arrived at Newport News for the Government. "The yards were filled up with cars for all the Government needs there, the military strictly as well as construction men, and so it ran along until it had just arrived at a hopeless stage." (R., p. 71).

After September 1, 1917, the Railway Company made deliveries under the line-haul rate to Camp Stuart on the siding which had been constructed (R., pp. 34-35, 48), but as the volume of freight increased the respondent

> "* * * experienced more and more difficulty in obtaining the necessary service on the tracks; in other words, the C. & O. would have cars in their yard for a week or ten days or two weeks before they would deliver to us on our siding, principally through the lack of, as they put it, train crews or engine facilities or some other thing, so that we had very many conferences with Mr. Ford (the Railway Company's Superintendent of Terminals) with a view of eliminating this condition, *and he finally stated to me that the only possibility of their*

being able to make these deliveries of material to us in time to avoid delays in the construction work would be by assigning to us a locomotive." (R., p. 45.)

In the meantime, about a thousand cars had arrived at Newport News for respondent, "and a large part of the cars were buried in the storage tracks in the C. & O. yards * * *." (R., p. 45.)

By the middle of September, 1917, conditions in the Newport News terminal of the Railway Company had reached such a stage that the Railway Company was not only unable to make delivery of cars, but was unable to keep the usual records of arrival and location of cars for the various consignees. The Government was in urgent need of the facilities which respondent had under construction, and therefore respondent employed A. G. Quarles, a man of over twenty-eight years of railroad experience, who had been in the employ of the Railway Company as brakeman, fireman, conductor, yard master, and general yard master, and placed him in the yards of the Railway Company at Newport News in charge of eight men who were also in the employ of respondent. Quarles placed four of these men at the entrance to the Newport News yards from Richmond, Va., two in the Twenty-eighth Street yard, and two at the float where cars floated by the Railway Company from Norfolk to Newport News landed. These men worked in night and day shifts, and under the direction of Quarles checked up the bills on incoming trains and floats and placed large tags or placards on all cars arriving for respondent,

which cards indicated that the cars to which they were attached were respondent's cars, and designated the siding upon which the cars were to be placed. Whenever the yard men of the Railway Company saw this card on a car they knew the car belonged to the respondent, and also upon what siding it should be placed. (R., pp. 64-65.)

A record was kept by respondent's employees under Quarles of all cars which arrived for the respondent, and this was the only record of such cars. The Railway Company, for one reason or another, failed utterly to keep any accurate record of cars arriving in its terminal at Newport News. The Railway Company "did not keep track of cars coming in" and,

> "The C. & O. men, themselves, were unable to locate cars by those track lists, and our material was scattered from the west end of the receiving yard down to the pier yard, that is, down to the river, and some of those cars had been in there since long before I got there, and some of them stayed in there for possibly two months after I got there before we could ever get to them, owing to the fact that cars were coming in all the time and it was impossible to get them to switch them out * * *." (R., p. 66.)

The result of these conditions was that cars loaded with material urgently needed by respondent for this Government construction were stored in various side tracks throughout the Railway Company's Newport News yards, and were being buried deeper

and deeper day by day, along with shipments arriving for other consignees. A large number of cars remained for weeks and months on the Railway Company's sidings, where they had been stored by the Railway Company, instead of being delivered to meet the urgent needs of the Government in this construction work. (See testimony of Bowie, R., pp. 44 to 49; of Seymour, R., pp 54 to 57; of Quarles, R., pp. 65 to 67; and of Major Love, Construction Quartermaster for the Government, R., pp. 71 to 73.)

By the latter part of September, 1917, conditions had reached such a stage that some action had to be taken to get delivery of respondent's shipments, in order that the construction work might proceed. Again conferences were held by the respondent's representatives and the Railway Company's superintendent. The *superintendent of the Railway Company stated* the only possible way for the Railway Company to make deliveries of these shipments would be to assign a locomotive for the purpose. (R., p. 45.) The Railway superintendent's "*point was, if we (respondent) had a locomotive assigned to our work and our work alone we would have more or less control over it and it would be, as he expressed it, a handy alibi to the other fellow who wanted a car placed.*" (R., p. 45.)

The Railway Company's superintendent asked that request for the assignment of a locomotive for the handling of respondent's shipments be made in writing, and pursuant to this request respondent's engineer, on September 28, 1917, wrote the Railway

Company a letter "couched in about the words he (the Railway Company's superintendent) suggested." (R., p. 46). This letter, (R., p. 2), was as follows:

"WESTINGHOUSE, CHURCH, KERR & CO., INC.

ENGINEERS AND CONSTRUCTORS.

Newport News, Va.,
September 28, 1917.

Chesapeake & Ohio Railroad Co.,
Newport News, Va.

Attention Mr. Ford, Supt. of Terminal.
1892-6.

Gentlemen:—

Referring to our conversation with you to-day, we believe the switching problem is getting so heavy on account of the work at the various sites that it would be advisable for you to assign us an engine and crew on your usual basis, billing us for the cost of operation as you may elect.

We would appreciate it if you would arrange for this engine and crew at the earliest possible moment, and also advise us if there is anything we can do towards helping out in furnishing a crew for this engine.

Yours very truly,

WESTINGHOUSE, CHURCH, KERR & COMPANY,

Alfred W. Bowie, Engineer in Charge."

On September 29, 1917, the Railway Company's superintendent replied, (R., p. 3), as follows:

"Newport News, Va.,
September 29, 1917.

Westinghouse, Church, Kerr & Company,
Newport News, Va.

Gentlemen:—

Your letter of the 28th inst. under file 1892-6, with respect to providing an engine and crew to take care of your business at the various camp sites.

Beg to state that this engine will be assigned to your work, commencing Monday night and you will be billed for the use of the engine and crew, together with the cost of supplies, repairs, etc., plus ten per cent.

Yours very truly,
(Signed) E. I. Ford, Superintendent."

Pursuant to these conferences and letters, the Railway Company assigned an engine and crew to the work of switching in its yards and delivering on the side tracks the cars which had arrived and were arriving for respondent. This engine operated during the daytime, but later another engine was assigned for night operation. The engines were the property of the petitioners, all supplies used by them were furnished by the petitioners, all repairs were made by the petitioners, they were stored by the petitioners when not in use, and were operated by a crew in the employ of the petitioners, and paid by them. The immediate direction of the operation of these engines was by Quarles, an employee of the respondent, when on duty, subject to the general direction and supervision of the petitioners' yard master in charge of the Newport News yards,

and when Quarles was off duty the engines were "operated under the immediate direction of the C. & O. yardmaster." (R., pp. 67-68.)

The bulk of the cars received for the defendant and handled by these engines moved interstate. A few of the cars were intrastate shipments. (R., p. 47.)

The engines so assigned to this work were used in ferreting the cars out of the sidings *in the petitioners' yards* where they had been stored for weeks and months, in breaking up trains in the petitioners' receiving and classification yards upon arrival at Newport News, in classifying the cars so arriving, in assembling respondent's cars on classification tracks designated by petitioners for the purpose, in delivering the cuts of cars so classified onto the sidings constructed for delivery of cars at Camp Stuart, Camp Hill, the warehouses and the stevedore camp, and in pulling out the empty cars and classifying them in the petitioners' yards for the return movement. These engines performed the entire terminal service which the petitioners were obligated to perform *quoad* the respondent's cars, and in a few instances performed a like service with respect to cars for other consignees. *The engines were not used for an intra-plant or inter-plant switching service or for a mere spotting service for the convenience of the respondent,* and the State court so held. (R., pp. 46-47, 51, 56-57, 66-69, 71-72, 112.)

The tariffs on file with the Interstate Commerce Commission and with the State Corporation Com-

mission of Virginia provided, and petitioners conceded, that the line haul rate entitled respondent to one placement of each of its cars on the sidings in these camps. (R., pp. 82, 26, 29-30, 33-35.) As stated above, and as the State courts found, it was this service which these engines performed.

Petitioners had no tariff on file with either the Interstate Commerce Commission or the State Corporation Commission of Virginia authorizing the so-called "rental charge" for these engines which they seek to recover in these actions. The charges are based upon a schedule of equipment rentals adopted by the petitioners which was not a part of their tariffs, and of which respondent had no knowledge. (R., pp. 22, 23, 83-85.) The special assignment of the engines was terminated on March 30, 1918. (R., p. 85.) No bills were rendered by petitioners to the respondent until after the work was practically completed, when the Railway Company rendered its bill for the period prior to Federal control, that is, the months of October, November, and December, 1917, (R., p. 86 *et seq.*), and the Director General rendered his bill for the period subsequent to the beginning of Federal control, that is, for the months of January, February, and March, 1918, (R., p. 91 *et seq.*). When the bills were rendered and submitted to the Construction Quartermaster representing the War Department, he refused to allow them as a proper charge. (R., p. 73.) Therefore, these actions were instituted to recover the respective amounts claimed.

DEFENSES.

These actions were defended on two grounds:

1. That the alleged contract under which petitioners seek to recover the so-called rental charges is violative of both the Interstate Commerce Act and the Elkins Act, and the corresponding provisions of the statutes of the State of Virginia, and is, therefore, null and void.

2. That the services performed by these engines and crews were services which the petitioners were obligated to render under the line-haul freight charge fixed by tariffs duly filed, that the alleged contract was, therefore, without a lawful consideration and is null and void.

The Supreme Court of Appeals of Virginia did not decide the question raised by the defense first mentioned, but disposed of the cases on the ground that "the service performed by the railway employees with the railway equipment was the precise service which the company was then under immediate obligation to perform with reasonable promptness under the circumstances and for which it has already been paid," and that, therefore, "there was no legal consideration for the promise relied on, and the trial court rightly determined that the railway company had no right to recover." (R., p. 116-117).

SPECIFICATION OF ERROR AND SUMMARY OF ARGUMENT.

QUESTION INVOLVED.

Under the above caption, petitioners' counsel, at page 8 of their brief, state the question involved to be:

> "Whether a contract by a carrier for the rental to a shipper of an engine and crew, which was thereupon put under his exclusive control, is void, because the engine and crew are used by the shipper, at his own convenience, in the performance of a transportation service included in the 'line-haul' freight charge?"

The foregoing quotation from petitioners' brief, (1) assumes facts which are not established by the record, and (2) does not, in our opinion, correctly state the question involved.

FIRST. While the charges sought to be collected are referred to in the record as "rental," and while the schedule of charges upon which these claims are based is designated "equipment rentals", (R., p. 83), not a word passed between petitioners and respondent as to the "rental" of the engines. Respondent's letter of September 28, 1917, requested the Railway Company "to assign us an engine and crew on your usual basis" and the letter of September 29, 1917, from the Railway Company to respondent stated the "engine will be assigned

to your work." (R., pp. 2-3.) Respondent's representatives had no knowledge of the rental circular. We submit it clearly appears that this was not a rental of equipment, but an assignment of equipment to this particular transportation service, and that the petitioners had the right to withdraw the equipment at any time, subject, of course, to their obligation to make deliveries of the cars.

SECOND. It clearly appears, we submit, that the engines were not under the "exclusive control" of respondent. On the contrary, we have shown in our statement of the case that the engines were operated by crews employed and paid by the petitioners, under the immediate direction of Quarles, an employee of respondent, when on duty, but under the general supervision of petitioners' yard master, and under the immediate supervision of petitioners' yard master when Quarles was off duty. (R., pp. 67-68.) The State court so found. (R., p. 114).

THIRD. We submit we have shown in our statement of the case that the engines were not assigned to this work to subserve the "convenience" of respondent in an intra-plant or inter-plant switching or spotting service, or otherwise, but for the purpose of performing a transportation service which petitioners were under obligation to perform, and for which they were paid. The State court so held. (R., pp. 116-117).

FOURTH. The Federal questions involved are these:

A. Whether the engines so assigned, and the services performed thereby, were "transportation" facilities and services within the purview of the Interstate Commerce Act?

B. If so, is the alleged contract violative of the Interstate Commerce Act, and, therefore, null and void?

C. As the alleged agreement was violative of, and void under, the laws of the State of Virginia *quoad* intrastate shipments, and as the alleged consideration is indivisible, can there be a recovery in any event?

D. Is the alleged agreement supported by a legal consideration?

We will discuss the case in the above aspects, and make reply to the argument advanced on behalf of the petitioners.

ARGUMENT

I.

THE FACILITIES FURNISHED AND SERVICES PERFORMED WERE A PART OF "TRANSPORTATION" AS DEFINED BY THE INTERSTATE COMMERCE ACT.

The term "railroad" is defined by Sec. 1, par. (2) of the Interstate Commerce Act, (See Appendix, *post*, p. 44), to include not only the main line of the railroad, but "all switches, spurs, tracks and terminal facilities of every kind used or necessary

in the *transportation*" of persons or property, "and also all freight depots, yards, and grounds used or necessary in the *transportation* or *delivery*" of said property.

The same paragraph of Sec. 1, defines the word "transportation" as used in the Act to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage . . . . and all services in connection with the receipt, *delivery* . . . . storage, and handling of property transported."

In construing these and other provisions of the Interstate Commerce Act, this Court in the case of *Cleveland, etc. Railway Company* v. *Dettlebach*, 239 U. S. 588, at pages 593-4 said:

> "And this is quite in line with the letter and policy of the Commerce Act, and especially of the amendment of June 29, 1906, known as the Hepburn Act (34 Stat. 584, c. 3591), which enlarged the definition of the term 'transportation,' (this, under the original act, included merely 'all instruments of shipment or carriage') so as to include 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof *and all services in connection with* the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, *storage*, and hauling *of property transported*; . . . . "
>
> "From this and other provisions of the Hepburn Act it is evident that Congress recognized

that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like."

And in the case of *Southern Railway Company* v. *Reid*, 222 U. S. 424, this court at page 440 said:

> "And transportation means not only the physical instrumentalities, *but all services in connection with receipt, delivery and handling of property transported.*" (Italics ours).

See also:

Southern Railway Company v. *Prescott*, 240 U. S. 632, 637-8.
Pennsylvania Railroad Co. v. *Lowman Shaft Coal Co.*, 242 U. S. 120, 122.

That it was the duty of petitioners to make delivery of respondent's cars on the sidings provided for the purpose is not controverted. In fact, petitioners admit that respondent was entitled to one placement of each car upon these sidings for unloading. Before the engines were especially assigned, and after the special assignment was terminated, the petitioners made delivery of respondent's cars on

the sidings under the line-haul rate, and without special charge. This it was obligated to do.

In *United States* v. *Texas and Pacific Railroad Company*, 185 Fed. 820, the court at page 823 said:

> "A carrier has a duty to fulfil under the law, when it accepts a shipment of freight, and that is to transport it from the point of origin and carry it to destination *and put it in the customary place of delivery for the consignee at the point of destination. And until it complies with that duty its liability as a common carrier remains.* (Italics ours.)

The facilities furnished by the petitioners were engines and crews especially assigned to the work in the yards of the railroad at Newport News of breaking up trains as they arrived, placing respondent's cars upon the tracks assigned for them in the classification yard, drilling out respondent's cars from the numerous tracks of the petitioners upon which they had stored them, placing those cars upon the tracks in the classification yard, making delivery of the cars thus classified upon the respective sidings constructed jointly by the Railway Company and the respondent for the specific purpose of making delivery to respondent, in taking out the empties from the sidings after the cars had been unloaded, and in performing the general service which every common carrier performs in making delivery of freight. The case is not one in which railroad equipment is withdrawn from the transportation service and devoted to a non-transportation service, such as an intraplant switching service.

We submit it is clear that the engines and crews assigned and the services performed thereby were transportation facilities and services clearly within the definition of the word "transportation" as defined in Sec. 1, par. (2) of the Interstate Commerce Act, and that this Court has so decided in the foregoing cases.

II.

THE FACILITIES FURNISHED AND SERVICES PERFORMED BEING "TRANSPORTATION" FACILITIES AND SERVICES, THE PETITIONERS VIOLATED SECTIONS 3 AND 6 OF THE INTERSTATE COMMERCE ACT AND SECTION 1 OF THE ELKINS ACT, IF THE FACILITIES AND SERVICES WERE IN ADDITION TO THOSE PROVIDED FOR IN THE LAWFULLY FILED TARIFFS.

Sec. 6, par. (1) of the Interstate Commerce Act (see Appendix, *post*, p. 46), requires common carriers to file with the Interstate Commerce Commission schedules of their rates, fares and charges, which schedules "shall also state separately all terminal charges . . . . all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee." That paragraph also provides that "the provisions of this section shall apply to all traffic, transportation and facilities defined in this Act."

Sec. 6, par. (3) of the Interstate Commerce Act (see Appendix, *post*, p. 47), prohibits any change in

the rates, fares, and charges except after notice and publication of new or revised tariffs.

Sec. 6, par. (7) of the Interstate Commerce Act (see Appendix, *post*, pp. 47-48), provides that unless otherwise provided by the Act, no carrier "shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act." It is further provided in this paragraph of Sec. 6, that no carrier shall "extend to any shipper or person any *privileges or facilities* in the transportation of passengers or property, *except such as are specified in such tariffs.*"

Section 3 of the Interstate Commerce Act (see Appendix, *post*, p. 45) makes it unlawful for a carrier subject to the Act "to make or give any undue or unreasonable preference or advantage" to any shipper or locality or particular description of traffic, "in any respect whatsoever, or to subject" any particular shipper, locality, or description of traffic "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 1 of the Elkins Act (see Appendix, *post*, p. 48) makes it unlawful to offer, give, or receive any "concession, or discrimination" in the transportation of property in interstate commerce whereby the property shall by any device whatever be transported at less rate than the tariff rate, "*or*

whereby any other advantage is given or discrimination is practiced."

This court, in *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, held that the foregoing provisions of the Act for the establishment and maintenance of rates and the foregoing and other prohibitions against preferences and discriminations were intended to afford an effective means against discriminations and preferences, and that there was an indissoluble unity between those provisions. In that case this court, at pp. 439-440, said:

> "When the general scope of the Act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discriminations. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow."

In *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, this Court, at p. 438, said:

> "The provisions of the Act are directed at the abuses most to be feared, unreasonableness in rates and discriminations, *including in the latter discriminations in service, in the acceptance and delivery of freight, and in facilities furnished.*" (Italics ours.)

And at p. 442 of its opinion in the *Reid Case* this Court further said:

> "It was no doubt the adaptation of experience to the exigencies of a practical problem, Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to 'engage or participate in the transportation of passengers or property' until they had fixed and proclaimed the rate to be charged therefor—a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times."

We think we have shown that the facilities afforded and the services rendered thereby were undoubtedly "transportation" facilities and services. Petitioners contend, however, that these "transportation" facilities and services were in addition to the facilities and services which were provided for in their tariffs lawfully filed, and in addition to the facilities and services which they were required to render to each and every consignee. This position of the petitioners inevitably defeats their claim of right to recover against respondent, for the obvious reason that if the facilities and services were in addition to those for which provision was made in the lawfully filed tariffs they violated the express provisions of Sec. 6, par. (7) of the Act, which prohibits carriers subject to the Act to participate in transportation until tariffs are filed, or to extend any privileges or facilities "except such as are specified in such tariffs." In such case, the petitioners also clearly violated Section 3 of the Act and Section 1 of

the Elkins Act, by affording the respondent transportation facilities and services which it did not offer to other shippers and consignees similarly situated, thereby giving an undue preference and advantage to respondent and unlawfully discriminating in favor of respondent.

See:

Davis v. *Cornwell*, 264 U. S. 560.
Southern Ry. Co. v. *Prescott*, (*supra*), 240 U. S. 632.
Cleveland, etc., Ry. Co. v. *Dettlebach*, (*supra*), 239 U. S. 588.
Atchison, etc., Ry. Co. v. *Robinson*, 233 U. S. 173.
Mitchell Coal Co. v. *Penn. R. R. Co.*, 230 U. S. 247, 261.
Chicago & Alton R. R. Co. v. *Kirby*, 225 U. S. 155.
Southern Ry. Co. v. *Reid*, (*supra*), 222 U. S. 424.
Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, (*supra*), 204 U. S. 426.
Louisville & Nashville R. R. Co. v. *Mottley*, 219 U. S. 467.
Rhodes v. *Iowa*, 170 U. S. 412.
Hocking Valley Ry. Co. v. *U. S.*, 210 Fed. 735.
Vandalia R. R. Co. v. *U. S.*, 226 Fed. 713.
Dye v. *U. S.*, 262 Fed. 6.
W. Va. Northern R. R. Co. v. *U. S.*, 134 Fed. 198.
Winn v. *American Express Co.*, 149 Ia. 259.
Cicardi Bros., etc., Co. v. *Penn. Co.*, 201 Mo. App. 609.
Clemons Produce Co. v. *Denver, etc., R. Co.*, 208 Mo. App. 100.
Central of Ga. Ry. Co. v. *Patterson*, 6 Ala. App. 494.

Underwood v. *Hines, Director General* (Mo.—no official report), 222 S. W. 1037.

Counsel for petitioners argued in the State court, and no doubt will argue in this court, that there is no law which prohibits a common carrier renting an engine or other equipment if it did not thereby impair its ability to perform its common carrier duties. That argument was advanced in the face of petitioners' admission that during the period here involved they did not have the necessary equipment and personnel to perform their common carrier obligations in the Newport News yards. If, under those circumstances, a common carrier can assign its engines and crews to the performance of the work for a particular shipper or consignee, to the exclusion of other shippers and consignees, we submit the door would be open wide to the grossest preferences and discriminations, and that the wholesome provisions of the laws of the United States and of the States might as well be erased from the statute books. If these petitioners could lawfully assign the engines in question to the performance of the terminal work for a particular shipper to the exclusion of other shippers and consignees, it could, under like conditions, assign its engines, crews, and cars to the performance of the complete transportation service, not only in yard movements, but in line-haul movements, for a particular shipper to the exclusion of other shippers. We confidently submit this court will not sanction such an arrangement, whereby the Interstate Commerce Act and related Acts, as well as the corresponding laws of the several States, might be readily evaded.

III.

The facilities furnished and the services performed being "transportation" facilities and services, the petitioners violated Sec. 1, par. (3), Sec. 2, and Sec. 6, par. (7) of the Interstate Commerce Act, if the facilities and services were not in addition to those provided for in the lawfully filed tariffs.

Sec. 1, par. (3) of the Interstate Commerce Act (See Appendix, *post*, pp. 44-45) provides that all charges for any services rendered in the transportation of property "shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Sec. 2 of the Interstate Commerce Act (See Appendix, *post*, p. 45) provides that if any carrier subject to its provisions shall directly or indirectly, by any device whatsoever, "charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered" in the transportation of property subject to the Act, "than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," such carrier shall be guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Sec. 6, par. (7) of the Interstate Commerce Act

(See Appendix, *post*, pp. 47-48) makes it unlawful for a carrier to "charge, or demand, or collect or receive a greater or less or different compensation" for the transportation of "property, or for any service in connection therewith," than the rates, fares and charges "specified in the tariff filed and in effect at the time."

The Supreme Court of Appeals of Virginia held that,

> "Here the service performed by the railway employees with the railway equipment was the precise service which the company was then under immediate obligation to perform with reasonable promptness under the circumstances and for which it has already been paid." (R., pp. 116-117).

If this Court should be of the same opinion, then it is apparent that the petitioners have charged and demanded, and are seeking in these actions to collect from respondent, sums aggregating $13,298.93, in addition to the tariff charges, for facilities and services which it was under tariff obligation to afford and perform, and for which it was paid. In this aspect of the case, we think no argument is necessary to demonstrate that such additional charge is unlawful, first, because there was no tariff authority for the charge, and Sec. 6, par. (7) of the Interstate Commerce Act makes it unlawful to charge, demand, collect or receive anything more or less than the tariff rate; second, because it is unjust and unreasonable and is prohibited and declared to be

unlawful by Section 1, paragraph (3) of the Interstate Commerce Act; and, third, because it constitutes an unjust discrimination, which is prohibited and declared to be unlawful by Section 2 of the Interstate Commerce Act.

See:

Louisville & Nashville Railroad Co. v. *Maxwell*, 237 U. S. 94.

Louisville & Nashville Railroad Co. v. *Mottley*, 219 U. S. 467.

Chicago, etc., Ry. Co. v. *United States*, 219 U. S. 486.

United States v. *Union Stock Yard and Transit Co. of Chicago*, 226 U. S. 286.

United States v. *Tozer*, 37 Fed. 635.

Lewis, Leonhardt & Co. v. *Southern Ry. Co.*, 217 Fed. 321.

IV.

THE ALLEGED AGREEMENT WAS VIOLATIVE OF, AND UNLAWFUL AND VOID UNDER, THE STATUTES OF THE STATE OF VIRGINIA.

The engines and crews especially assigned handled intrastate shipments as well as interstate shipments, although the latter vastly predominated. Subsections (2) to (8), inclusive, of Section 1294-c of Pollard's Virginia Code, 1904, contain regulatory and prohibitory provisions applicable to intrastate shipments similar to those of the Federal statutes which apply to the interstate shipments. The Supreme Court of Appeals of Virginia held that the service performed was the precise service which

petitioners were under immediate obligation to perform, and for which they had already been paid, and that therefore the alleged agreement was not supported by legal consideration. This holding applied to both interstate and intrastate shipments. In any aspect of the case, the decision of the Virginia Court, we submit, is conclusive *quoad* the intrastate shipments and is not subject to review by this Honorable Court. However, our remarks with reference to the violations of Federal statutes apply under the statutes of Virginia, so far as the intrastate shipments are concerned.

V.

THE ALLEGED AGREEMENT, BEING VIOLATIVE OF THE INTERSTATE COMMERCE ACT AND THE ELKINS ACT, AND THE CORRESPONDING PROVISIONS OF THE STATUTES OF THE STATE OF VIRGINIA, IS VOID AND NO ACTION CAN BE MAINTAINED THEREON.

It is settled, of course, that an agreement which violates the statutory provisions in question is utterly void, and that neither party thereto can maintain an action thereon. This is conclusively established by the decisions cited in the foregoing pages of this brief. See, also:

Cleveland, etc., Ry. Co. v. *Hirsch*, 204 *Fed.* 849, 853-854

Central R. R. Company of N. J. v. *U. S. Pipe Line Co.*, 290 Fed. 983, 987.

Lewis, Leonhardt & Co. v. *Southern Ry. Co.*, 217 Fed. 321, 328.

The case of *Cleveland, etc. Ry. Co.* v. *Hirsch*, (*supra*), 204 Fed. 849, which involved violation of the Interstate Commerce Act and of the corresponding statutory provisions of the State of Ohio, applied the well-recognized principle that where an indivisible part of the consideration for a contract is tainted with illegality the entire contract is illegal and void. The Circuit Court of Appeals, Sixth Circuit, in its opinion, at pp. 853-854, said:

> "It is claimed, however, that, since intrastate traffic is involved under the contract, it is not enough simply to show that the contract is violative of the Interstate Commerce Act. There are two answers to this: In the first place, the settled rule is that the courts regard a contract as illegal where an essential and indivisible part of its consideration is tainted with illegality. *Armstrong* v. *Toler*, 11 Wheat, 258, 271, 6 L. Ed. 468; *E. E. Taenzer & Co.* v. *Chicago, R. I. & P. Ry. Co., supra*, 191 Fed. 550, 112 C. C. A. 153; *Widoe* v. *Webb*, 20 Ohio St. 431, 435, 5 Am. Rep. 664; *McQuade* v. *Rosecrans*, 36 Ohio St. 442, 448. There is nothing in the present contract to indicate an intent to distinguish between the two classes of commerce, interstate and intrastate; the traffic, as well as the use of the premises, is treated as an entirety."

As the decision of the Virginia Court that the alleged agreement was void is conclusive *quoad* intrastate shipments, and as the alleged consideration for the agreement here involved is indivisible, the entire agreement for this further reason neces-

sarily falls under the principle applied in the *Hirsch* case.

VI.

ARGUMENT ON BEHALF OF PETITIONERS ANSWERED.

POINT I.

"Point I," advanced and argued at p. 9 *et seq.* of the brief for petitioners is that there was no obligation upon the petitioners, under the line-haul tariff rate, to furnish switching and spotting service solely for the convenience of respondent.

We do not contend that petitioners were under any such obligation. One of the questions of fact in the case was the character of service which the engines performed. Petitioners' superintendent, Ford, testified the engines performed partly a spotting service. On the other hand, all of the other witnesses who testified on the point state emphatically that the engines were not used for intra-plant or inter-plant switching service, or for spotting service at the petitioners' convenience, but were used in delivering petitioners' cars on the sidetracks in the camps and at the warehouses which had been provided and designated as the place of delivery. Ford was in charge of the terminal and had manifold duties to perform. He was not in active touch with the engines. The trial court and the Supreme Court of Appeals of Virginia found as a fact that

the engines were not used for intra-plant or inter-plant switching, or for spotting service for the convenience of the shipper, but, on the contrary, that they were used in the performance of the regular terminal service which the petitioners were required to render and should have rendered under the legally filed tariffs. (R., pp. 115, 116-117). The finding of the State Courts concludes that issue of fact, and therefore, we submit, the argument on behalf of petitioners under "Point I," and the authorities relied upon have no application to this case.

POINT II.

"Point II," stated and argued at p. 11 *et seq.* of the brief for petitioners, is that the obligation of a carrier to place or spot cars under the line-haul tariff rate does not contemplate the furnishing of special facilities to a shipper to meet abnormal conditions.

We do not contend the petitioners were under obligation to furnish special facilities or services to a particular shipper or consignee to meet abnormal conditions. We do contend, however, and submit we have shown, that the facilities and services afforded by these petitioners were "transportation" facilities and services, that if they were in addition to those provided for in the lawfully filed tariffs the petitioners violated Sections 3 and 6 of the Interstate Commerce Act amd Section 1 of the Elkins Act, and that if they were not in addition to the facilities and services provided for in the lawfully

filed tariffs the petitioners violated Sec. 1, par. (3), Sec. 2, and Sec. 6, par. (7), of the Interstate Commerce Act, and that, therefore, in either aspect the alleged agreement is tainted with illegality and is wholly null and void.

Nor do we contend that the petitioners would have been liable in damages to respondent for its failure to make delivery when such failure resulted from sudden and great demands which it had no reason to anticipate, or that the respondent would be entitled to recover from petitioners for any service which it may have rendered in the transportation. Therefore, the quotations at pp. 12 to 14 of petitioners' brief from the cases of *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 221, and *Waste Merchants Association* v. *Director General*, 57 I. C. C. 686, have no application to these cases. We submit the fact that a carrier is not liable in damages for failure to render service under sudden and unanticipated demands, or that a shipper may not be entitled to an allowance for a service rendered in connection with the transportation, can have no bearing upon a case in which a carrier seeks to recover on an alleged agreement of this character.

POINT III.

"Point III," stated and argued at p. 16 *et seq.* of the brief for petitioners, is that the contract for the rental of the engines did not constitute an undue preference or an illegal, expedited service.

1. We think we have shown that these cases involve the assignment of the engines and crews to the performance of the "transportation" service of delivering respondent's cars, and that in any aspect of the case the petitioners violated the statutes of the United States and of the State of Virginia.

The authorities cited and relied upon at pp. 17 and 18 of petitioners' brief were decided on the long-settled principle that a railroad company does not act as a common carrier in hauling circus trains and the like, that the law of common carriers does not apply in such cases, and that therefore a railroad, in contracting under such circumstances acts in its individual and not in its common carrier capacity. The principle has been applied in numerous cases, and we need not prolong this brief by discussing in detail the cases cited in petitioners' brief. We think it is obvious the principle applied in those cases has no application to these cases, and the Virginia court so held. (R., p. 116).

2. At p. 18 of the brief for petitioners, it is stated that if the question of preference or expedited service is involved in these cases "it is believed the failure to exact payment for the engine and crew will constitute a preference, since respondent is thereby given a preference over other shippers during the term of this contract . . . ." and the cases of *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155, and *Davis* v. *Cornwell*, 264 U. S. 560, are cited in support of that expression of belief.

In the *Kirby Case*, the shipper sued for damages alleged to have resulted from failure to give expedited service to a carload shipment of high grade horses. This Court held the special contract was invalid under the Interstate Commerce Act, and denied recovery. In the *Cornwell Case*, the shipper sued on an alleged contract whereby it was claimed the carrier agreed to furnish empty cars on a certain day for shipment of cattle. This Court held that furnishing cars was a part of the transportation within the Interstate Commerce Act, and a common carrier service, that a contract to furnish cars on a certain day imposed a greater obligation than that implied in the tariff, and that the contract was therefore void. These cases present the identical situation, except here the carriers are suing instead of a shipper. Petitioners seek to recover on a contract under which they contend a special service not afforded other consignees was rendered. That service was a common carrier transportation service. For the same reasons that the special contracts in the *Kirby* and *Cornwell Cases* were held to be illegal and void, the alleged agreement in this case is illegal and void, and while the respondent may have received the benefit of facilities and services which the petitioners could not legally afford, the agreement is nevertheless tainted with illegality and can afford no basis for recovery by the petitioners.

3. At p. 20 of the brief for petitioners, quotation is made from the Naval Appropriation Act of August 29, 1916, 39 Stat. 604, which amended Section 6

of the Interstate Commerce Act, and which provided that in time of war "preference and precedence shall, *upon demand of the President of the United States*, be given over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic." Quotation is also made at p. 21 from the President's proclamation assuming control of the railroads, effective at 12:00 o'clock M. on December 28, 1917, except for accounting purposes, and effective at 12:00 o'clock midnight on December 31, 1917, for accounting purposes, in which it was stated such control was taken "to the end that such systems of transportation be utilized for the transportation of troops, war material and equipment, to the exclusion as far as may be necessary of all other traffic thereof."

It is argued from these provisions of the Act of August 29, 1916, and the President's proclamation that petitioners were justified in giving an expedited service in the delivery of this construction material, that obviously the Act of August 29, 1916, did not require a carrier to place its equipment at the disposal of the Government without consideration, and that therefore the petitioners were justified in rendering an expedited service and in charging therefor. This argument has many fallacies.

First. The provision in question of the Act of August 29, 1916, applied only "upon demand of the President of the United States." It is not even

suggested in this record that any demand was made by the President to the Chesapeake & Ohio Railway Company, the petitioner in case No. 170, prior to Federal control. The President's proclamation was dated December 26, 1917, and was not effective in any of its terms until December 28, 1917, and the facilities and services afforded by the Chesapeake & Ohio Railway Company were afforded prior to the effective date of the proclamation. Therefore, in no event does the Act of August 29, 1916, apply to, or in any way affect, case No. 170.

Second. In assuming control of the railroads, the President did not act under authority of Sec. 6 of the Interstate Commerce Act as amended by the Naval Appropriation Act of August 29, 1916, and the President's proclamation was not predicated upon that Act. On the contrary, the President took possession of the railroads under, and the President's proclamation was based upon, the provisions of the Act approved August 29, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," (39 Stat. 465). This Act provided:

> "The President in time of war is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment, or for such other

purposes connected with the emergency as may be needful or desirable."

Neither this Act nor the Presidential proclamation of December 26, 1917, suspended the operation of the Interstate Commerce Act or the Elkins Act. In fact, the proclamation specifically provided that:

> "Until and except so far as said Director (the Director General of Railroads) shall from time to time otherwise by general or special orders determine, such systems of transportation *shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof may be situated.*" (Italics ours).

Sec. 10 of the subsequent Act of Congress of March 21, 1918, c. 25, 40 Stat. 451, commonly known as the Federal Control Act, provided:

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President."

Sec. 10 of the Federal Control Act empowered the President to initiate "rates, fares, charges, classifications, regulations, and practices *by filing the same with the Interstate Commerce Commission. . . .*" The Interstate Commerce Commission was pro-

hibited from suspending rates so initiated by the President, pending final determination, but it was provided that the rates so initiated by filing the same with the Interstate Commerce Commission, "shall be reasonable and just," and the Interstate Commerce Commission was given the power, and was directed, upon complaint, to inquire into the justness and reasonableness thereof, and after full hearing to make such findings and orders "as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act."

It has been expressly held that neither the act of Congress empowering the President to take possession of the railroads nor the Presidential proclamation suspended the operation of the provisions in question of the Interstate Commerce Act, or of the Elkins Act. *United States* v. *Metropolitan Lumber Co.*, 254 Fed. 335, 349.

It is true the cars of material which were handled by these engines were for use by the respondent in constructing the Government facilities at the Port of Embarkation. At the same time, shipments for the War Department of military material and supplies strictly, as distinguished from contractors' construction materials, were arriving and in the Newport News yards. (R., pp. 71-72.) No officer of the United States had designated respondent's cars as war material entitled to priority. In fact, as we have shown, the General in charge of the port and the Government's Construction Quartermaster,

in conjunction with respondent's Construction Engineer, had conference after conference with petitioners' Superintendent in an endeavor to have petitioners deliver the shipments in question, and it was not the result of a demand, or designation of the shipments as war material, which prompted petitioners to assign these engines, but the result of conferences in which respondent urged petitioners to take action to make deliveries of the material.

If it were conceded, or if this Court should be of opinion, that this material for construction purposes was "war material" within the meaning of those words as they are used in the enabling Act and in the Presidential proclamation, and if it were made to appear in this record, which is not the case, that a proper Government officer had requested or demanded that priority be given to the delivery of the cars containing the material, still no justification would be shown for the attempt to collect this very substantial additional charge in excess of the lawful tariff rates. While a carrier might justify a preference given to "war material" over other traffic, upon a proper showing, it could, we submit, in no event charge more than the tariff rate for the service. It would render no additional service in giving such priority which would entitle it to a higher charge, but would give only priority of movement to one class of freight over another. In no event could it charge, demand, collect, or receive a greater or less or different compensation than that specified in the tariffs.

Third. The contract between petitioners and the United States Government was a cost plus contract, and if the petitioners were to recover the respondent would be entitled to reimbursement from the War Department, plus its commission. There is presented, therefore, the unique situation of the Railroad Administration, an arm of the United States Government, suing the respondent for charges which, we submit, are utterly unlawful, and which if petitioners prevail, will ultimately be paid by the War Department, plus the commission. We submit that neither the Act enabling the President to take over the railroads nor the Presidential proclamation was intended to, or will, operate to bring about this result.

VII.

THE ALLEGED AGREEMENT IS NOT SUPPORTED BY A LEGAL CONSIDERATION.

The services performed by petitioners with the engines were either (1) special services in addition to those provided in the tariff, in which event the agreement violated the Interstate Commerce Act and the Elkins Act, as well as the statutes of the State of Virginia, or (2) they were services which the petitioners were obligated to perform under the line-haul rate and the statutes in question, in which case the services were the identical services which petitioners were under immediate obligation to perform, as was held by the Supreme Court of Appeals of Virginia. In the latter event, the peti-

tioners did no more than they were under immediate obligation to do, and it necessarily follows in such case that the alleged agreement was without legal consideration. The absence of a legal consideration to support an undertaking renders the undertaking void and unenforceable, and no recovery can be had thereon upon familiar principles, a discussion of which we need not undertake.

CONCLUSION.

We submit we have shown the petitioners are not entitled to recover in any aspect of these cases, and for the reasons hereinbefore stated and discussed it is urged that the judgment of the Supreme Court of Appeals of Virginia should be affirmed.

Respectfully submitted,

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APPENDIX.

Sec. 1, par. (2) of Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended June 29, 1906, c. 3591, Sec. 1, 34 Stat. 584, and June 18, 1910, c. 309, Sec. 7, 36 Stat. 544, provides in part:

> The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Sec. 1, par. (3) of Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended June 29, 1906, c. 3591, Sec. 1, 34 Stat. 584, and June 18, 1910, c. 309, Sec. 7, 36 Stat. 544, provides in part:

All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 2 of Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, provides:

That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful.

Sec. 3 of Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 380, provides in part:

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person,

company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Sec. 6, par. (1) of Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 380, as amended March 2, 1889, c. 382, Sec. 1, 25 Stat. 855, and June 29, 1906, c. 3591, Sec. 2, 34 Stat. 586, provides:

That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which

in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Sec. 6, par. (3) of Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 381, as amended March 2, 1889, c. 382, Sec. 1, 25 Stat. 856, and June 29, 1906, c. 3591, Sec. 2, 34 Stat. 586, provides in part:

> No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection.

Sec. 6, par. (7) of Interstate Commerce Act,

February 4, 1887, c. 104, 24 Stat. 381, as amended March 2, 1889, c. 382, Sec. 1, 25 Stat. 856, and June 29, 1906, c. 3591, Sec. 2, 34 Stat. 587, provides in part:

> No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Sec. 1 of the Elkins Act, February 19, 1903, c. 708, 32 Stat. 847, as amended June 29, 1906, c. 3591, Sec. 2, 34 Stat. 589, provides in part:

> * * * and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common car-

rier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced.

Sec. 10 of the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451, provides in part:

> That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President.
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> * * * * * * * *
>
> That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.
>
> Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any

order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition.

After full hearing the Commission may make such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: *Provided, however*, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make.